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IN THE

# SUPREME COURT

## OF THE UNITED STATES

October Term, 1906.

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No. 252.

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THE STATE OF MONTANA ex rel CHARLES S. HAIRE,

Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer,

Defendant in Error.

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## BRIEF OF DEFENDANT IN ERROR.

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ALBERT J. GALEN,
Attorney General,
W. H. POORMAN, and
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## NO FEDERAL QUESTION INVOLVED.

The only question necessarily involved in this case is "Does the act of the legislative assembly of the State of Montana (Appendix, appellant's brief, p. 40), conflict with the constitution of the State of Montana?" This is not a federal question.

The only federal question that *can* be involved is as to whether or not the State of Montana is violating, or has violated, a trust imposed upon it, or reposed in it, by the act of Congress of February 22, 1889 (25 Stat. at large, 676), known as the "Enabling Act" which makes certain grants of land to the State of Montana, and this is a question that can exist only between the United States and the state, and cannot be raised by a private party.

> "It is a matter between two sovereign powers and one which private parties cannot bring into discussion."
>
> Miller Co. v. Railroad Co.'s., 107 U. S. 557; also U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 511.

The case of Kennard v. Nebraska involved the construction by the State Supreme Court of section 12 of the Enabling Act of that state (13 Stat. 197), relating to lands of Indian Reservations, and the state court held that the lands of the "Pawnee Indian Reservation" were public lands within the meaning of section 12 of the Enabling Act. The case was then brought to this court and the decision thereon is reported in 186 U. S. 304, where this court, in affirming the judgment of said court said in part:

> "There is no dispute as to the facts out of which the controversy arose. The right of the plaintiff to

recover under his contract with the state is not for us to determine, unless the record discloses that he has been deprived of some title, right, privilege or immunity secured to him by the constitution of the United States, and unless it appears that such title, right, privilege or immunity was specially set up or claimed in the state court. Oxley Stave Co. v. Butler Co., 166 U. S., page 648; Water Power Co. v. Street Rwy. Co., 172 U. S. 475."

In the case at bar there is no claim nor pretense that the plaintiff in error was guaranteed any rights, privileges or immunities by the constitution or laws of the United States, hence his right to recover, if he can recover at all, is based solely upon the state law. This court in the Kennard case, above, further said:

"But the validity of the acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the state court rests upon section 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not 'drawn in question' within the meaning of section 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210; Cook County v. Calumet &c Canal Co., 138 U. S. 635, 653; Borgmeyer v. Idler, 159 U. S. 408; Blackburn v. Portland Mining Co., 175 U. S. 571; Florida Central Railroad Co. v. Bell, 176 U. S. 321, 328; Water Power Co. v. Street Ry. Co., 172 U. S. 488.

The decision by the Supreme Court of the state, that the Pawnee Reservation lands in Nebraska were public lands within the meaning of the twelfth section of the Enabling Act did not bring into question the validity of that section—much less was it a decision *against* its validity."

The plaintiff in error, therefore, cannot raise this question, and no other federal question *can* be involved.

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Section 12, Article XI of the state constitution of Montana provides:

> "The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

The Supreme Court of Montana in the concluding paragraph of the decision of this case, found on page 34 of the transcript herein, says:

> "The act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of Normal School lands, or of the timber on lands granted in aid of the state Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI of the state constitution, and is, therefore, void and of no effect; and, being so, the State Treasurer rightly refused to proceed under it and cannot be coerced by *mandamus*."

And while the court in the discussion did make some reference to the decision of the Supreme Court of the states of Washington and North Dakota and expressed

some disapproval therewith, yet the decision of the Montana court was, and is, based wholly upon a construction of the state constitution.

The construction placed upon a state statute or a state constitution by the highest tribunal of the state will be regarded as conclusive upon the federal court as to the state law.

> Williams, Treasurer, v. Eggleston, 170 U. S. 304 (at p. 311).
>
> Adams Express Co. v. Ohio, 165 U. S. 194 (at p. 219).

The construction of this state constitution is in no sense a federal question, and the court did not place any construction upon this act of Congress.

> "The rule is settled that before giving this court jurisdiction of the writ of error to a state court it must appear affirmatively, not only that the federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216; Johnson v. Risk, 137 U. S. 300. Tested by this rule this writ of error cannot be sustained."
>
> Cook County v. Calumet & Chicago Canal & Dock Co., 138 U. S. 635 (at p. 651).

If this honorable court should find and hold that the State of Montana or the legislature of Montana, under the terms of the Enabling Act was, and is, vested with the authority to convert these land grants into funds which might be used for the erection of buildings, the

purchase of furniture or school apparatus, or for the construction of roads or bridges, the fact will still remain that the State of Montana, by its constitution has placed a restriction upon itself and upon its legislature, as expressed in the section of the state constitution above quoted.

If, as contended by appellant, this grant and the acceptance thereof is a contract, then, we ask, "who are the contracting parties?" certainly not the United States and Mr. Haire, the plaintiff in error herein, nor the United States and the state legislature, for the legislature has no existence separate from the state, but these contracting parties must be the United States and the State of Montana. By what right then, does the plaintiff in error demand that this court construe a contract to which he is not a party? Clearly the only purpose of this plaintiff in error is to have this court declare valid an act of the state legislature, notwithstanding the fact that that act is in direct contravention of the state constitution. The concluding clause of section 17 of the Enabling Act, "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes therein mentioned, in such manner as the legislatures of the respective states may severally provide," does not have the effect of constituting the state legislature the agent of the United States for the disposition of these lands, but the legislature is named in the act only because it is the department of the state government vested by the state constitution with the authority of enacting laws and prescribing rules for the disposition of state property, but these laws and rules cannot contravene the state constitution which created the legislature and to which it must look for its authority to exist at all. A grant of

land to the state with a power vested in an agent to dispose of the land according to the will of the agent and without regard to the will of the state would, in effect, be a grant to such agent. The state would only be a "dummy" in such a transaction, but said section 17 specifically declares that the grant in this case is made "to the State of Montana."

No federal question can be predicated on such a claim or theory of supreme legislative agency.

To give the plaintiff in error the relief demanded it will be necessary for this court to declare void this section of the state constitution. The defendant in error insists that there is no federal question involved herein and that this cause should be dismissed.

No formal motion has been made to dismiss this cause on jurisdictional grounds for the reason that we understand the rule to be as stated by the honorable Circuit Judge Gilbert in United States v. North Bloomfield Gravel Min. Co., 53 Fed. Rep. 625:

> "There can be no question of the right of the defendant to raise this objection to the jurisdiction upon final hearing. It is not a question of personal privilege, which can be waived by answer or by going to trial upon the merits. It is a fundamental question, that goes to the right of the court to hear and determine the matters involved in the suit. If the courts have not the inherent power to hear and determine the cause, the parties to the suit cannot, either by their failure or neglect to attack the jurisdiction or by their express consent and desire to confer jurisdiction, authorize the court to proceed. The judgment of the court in such a case would be a nullity. Hence it is not left to the parties alone to raise the question of the jurisdiction, but by statute it is made the duty of the court itself to dismiss the cause, upon its own motion, whenever the want of jurisdiction shall appear. Grace v. Insurance

Co., 109 U. S. 278, 3 Sup. Ct. Rep. 207; Bors v. Preston, 111 U. S. 252, 4 Sup. Ct. Rep. 407; Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. Rep. 510."

Without waiving the above objections to the jurisdiction of this Honorable Court to hear and decide this case, we shall proceed to brief and argue the questions presented by the record.

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## STATEMENT OF CASE.

This action was brought for a writ of mandamus to compel the defendant in error, James H. Rice, as State Treasurer, to pay the plaintiff in error, Charles S. Haire, twelve hundred dollars, the amount of a certain warrant issued to said Haire by the State Auditor against what was designated as the "State Normal School Fund," for services performed by him as architect and superintendent of construction in connection with the erection of an addition to the State Normal School at Dillon, Montana.

As appears from the petition (Record pp. 1 to 5), "the state board of land commissioners of the State of Montana, pursuant to the authority conferred by and the directions contained in an act of the legislative assembly of Montana (appendix to brief of Plaintiff in error, p. 40), issued coupon bonds to the amount of seventy-five thousand dollars, dated May 1, 1905, of the denomination of one thousand dollars each. (For copy of one of said bonds, see Record pp. 4 and 5.)

Said law and bonds attempted to pledge for the payment of such bonds and accruing interest thereon, "all

funds realized from the sale or the leasing of the lands, and licenses to cut trees thereon, said lands comprising one hundred thousand acres, granted by the United States to the State of Montana," "for state normal schools," under and by virtue of an act of Congress, approved February 22, 1889, entitled: "An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form state governments and to be admitted into the Union on an equal footing with the original states and to make donations of public lands to such states" (25 Stat. 676), which said act will be hereinafter referred to in this brief as "The Enabling Act."

To said petition filed herein defendant in error demurred for the reason that it did not state facts sufficient to constitute a cause of action; and to the alternative writ of mandate issued, defendant in error made a motion to quash upon the grounds that the petition upon which the writ was issued did not state facts sufficient to constitute a cause of action or to entitle the plaintiff in error to the relief demanded or any relief, and that the petition showed on its face that the act of the legislature mentioned in said petition pursuant to which said bonds were issued is violative of the provisions of said Enabling Act and of the State Constitution, and further, for the reason that said petition showed on its face, that the issue of the bonds mentioned therein constituted a State indebtedness in excess of the Constitutional limit of one hundred thousand dollars, without authority of law. (See Record pp. 7 and 8.)

The said motion to quash was sustained and the proceedings dismissed. (Record p. 8.) Whereupon plaintiff in error petitioned for a writ of error to this court. (Record pp. 36 to 41.)

When reference is hereinafter made to bonds of State institutions, or to state normal school bonds, it is simply for the purpose of convenience and brevity, and it is not to be taken as an admission on the part of the defendant in error that they are legally entitled to such designation.

## QUESTIONS PRESENTED.

1. Does section 11 of the Enabling Act limit and control the grants of land made to the states by section 17 of said act in the same manner as it does the grants made by the other sections of said act?

2. If said section 11 of the Enabling Act does limit and control the grants made by said section 17 thereof, does the act of the legislature of Montana, approved February 2nd, 1905, and set out in appendix to brief of plaintiff in error (pp. 40 to 45), violate the provisions of said section 11?

3. If said section 11 of the enabling act does not limit and control said section 17 thereof, then does the title to the lands therein granted, when selected, vest in the State free of any limitations or conditions?

4. If the title to the lands granted by said section 17 of the Enabling Act vests, when selected, in the states without any limitations or conditions, then, under the last clause of said section 17, must such lands be "held, appropriated and disposed of" *only* "in such manner as the legislatures of the respective states may severally provide, or may the constitutional conventions of the states to which such lands were granted accept the grants, and in the constitutions by them adopted impose limitations and conditions upon the use and disposal of the same, and upon the proceeds received from the sale

thereof, which will be controling and binding upon the legislatures established and provided for by said constitutions?

5. If the constitution of Montana may lawfully impose any condition or limitation upon the lands granted by section 17 of the Enabling Act, does the act of the legislature of Montana, approved February 2nd, 1905 (see appendix to brief of plaintiff in error), violate the provisions of section 3 and 12 of Art. XI, of the State Constitution?

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## BRIEF AND ARGUMENT.

### THE ENABLING ACT.

Before taking up the construction of the Enabling Act of this State, we deem it important to briefly review the policy of the National Government in granting lands to the various states.

#### *Review of Statutes.*

Many grants of land and other donations have been made by Congress to the several States from time to time for specific and general purposes. All these grants and donations may be classified and are either for,

1. Internal improvements,
2. Educational purposes.

#### 1. *Internal Improvements.*

The principal grants for internal improvements are the grants of September 4, 1841, (U. S. Stats. 453), and

the act of September 28, 1850 (Secs. 2479-2481, Rev. Stat. U. S. 1878). Both these acts are referred to in section 17 of the Montana Enabling Act, with reference to the grant of land "for state normal schools."

Section 8 of the Act of September 4, 1841, grants five hundred thousand acres of land to each state mentioned in the act and to each new state afterwards admitted into the Union, "for the purpose of internal improvements." Section 9 of the act provides that the land granted shall not be disposed of at a price less than $1.25 per acre, and the net proceeds of the sale of said land shall be faithfully applied to the objects of internal improvement—namely, roads, railroads, bridges, canals, improvement of water courses and draining of swamps, and such roads, railroads, canals, bridges and water courses shall be free for the transportation of the United States mail and munitions of war and for the passage of troops without the payment of any toll whatever.

By the terms of this grant the government retained a perpetual easement, right or interest in the objects to be attained by the grant, and if that part of the grant naming the purposes of the grant were not repealed by the Enabling Act, none of the money derived from the sale of the land could, without a violation of faith on the part of the state, be used for the erection of school buildings, or for the maintenance, perpetuation or support of educational institutions, for such purposes are totally foreign to the purposes of the original grant.

The Act of September 28, 1850, granted, in fee simple, certain swamp and overflow lands to certain states, to *enable the states* to reclaim such lands. This act also provides "the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied ex-

clusively, as far as necessary, to the reclaiming of said lands by means of levees and drains."

This grant was made without condition or restriction and for the sole benefit of the state, the government retained no right, no interest, no easement in the land or in the improvements placed thereon. The state could choose its own time and manner of making such reclamation; it could construct embankments, levees or roads, excavate drains or establish railroads, or could use the money received from the sale of the land, if such land could be sold prior to reclamation, for such purposes, or it could use such money for other purposes and make appropriations in kind for such improvements, or accomplish the reclamation without appropriation. The purposes of this grant, and the power of the state thereunder, are fully discussed in Mills County v. Railway, 107 U. S. 557, where the court says, in part:

> "Swamp and overflow lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas the state governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the promotion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the states in which they lay, subject to the disposal of their respective legislatures; and although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the states alone, when they accepted the grant; and, whether faithfully performed or not, is a question between the United States and the

states, and is neither a trust following the lands nor a duty which private parties can enforce as against the state."

See also, U. S. v. Louisiana, 127 U. S. 182.

The state cannot claim any authority from the terms of this act, making one of the original grants referred to in section 17 of the Enabling Act, for the reason that by the terms of said section 17 such original grant does not extend to Montana. Furthermore, the question here is not how far the state may with safety go in disregarding its promise, but rather how that promise may be best kept and obeyed in its entirety, and how the state may best observe the spirit as well as the letter of its plighted faith in the discharge of its duties as trustee of an express trust, and bring into captivity every thought and energy to the obedience of a promise made; a pledge given; a trust accepted.

2. *Grants for Educational Purposes.*

By the Act of Congress of July 2, 1862, c. 130, 12 Stat. 503, amended by the Act of March 3, 1883, c. 102, 22 Stat. 484, Congress granted to each state, for agricultural college purposes, thirty thousand acres of land "for each senator and representative such state has in Congress."

This grant is made upon certain conditions named in section 5 of the act "to which, as well as the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts." The previous conditions named in the act are, that the principal arising from the sale of the lands shall forever remain unimpaired; that the money shall constitute a perpetual fund which shall forever remain undiminished.

Sub-division 2 of section 5 of this act provides: "No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings."

The only legislative assent that has ever been given by the State of Montana to the terms and conditions of this grant is contained in sub-division 7, Ordinance 1, of the State Constitution, which is that "the State of Montana hereby accepts the several grants of land from the United States to the State of Montana mentioned in an act of Congress (Montana Enabling Act), * * * approved February 22, 1889, upon the terms and conditions therein provided." This grant is confirmed and extended to the State of Montana by section 16 of the Enabling Act. But this section does not mention the conditions of the grant above referred to, nor does the Enabling Act anywhere contain these conditions, except by the limitations as to the use of the funds expressed in section 11 of the Enabling Act. The assent to the conditions named in the original act was imperative to the attaching of the grant. Yet the government has recognized this acceptance contained in the ordinance as sufficient to give effect to the grant and has issued patents for the land. In doing this the government must necessarily have construed the limitations expressed in section 11 of said Enabling Act as applying to the grant named in section 16 of said act. And as section 11 must be read in connection with section 16, it must likewise be read in connection with section 17 of said Enabling Act. Furthermore, this Act of 1862 contains many other conditions which must be complied with on the part of the state, among them being, that the funds shall be invested and

shall yield not less than five per cent. per annum, and that if the state fail to comply with the conditions of the grant the grant does not attach. Yet, unless the provisions of said section 11 of our Enabling Act apply to this grant as named in section 16 of the Enabling Act, the original Act of 1862 stands in its entirety and imposes conditions which never have been complied with by the State of Montana.

The Act of Congress of May 26, 1864, 13 Stat. 91, (Sec. 1946, Rev. Stats. U. S.) reserves, for the purpose of being applied to the common schools, sections 16 and 36 of each township of the territory. Title to such lands became vested in the state by the provisions of section 10 of the Enabling Act, the expressed purpose of the grant being for the support of common schools. Prior to the admission of the territory as a state, this was a mere reservation and not a grant.

U. S. v. Bisel, 8 Mont. 20.

The act of February 18, 1881 (21 Stat. 326), granted to the Territory of Montana seventy-two sections of land for the use and support of a university. The conditions of this grant, as expressed in the original act, are in substance, that the lands must be appraised and must be sold at public auction at not less than the appraised value, and in no case for less than $2.50 per acre and not more than one-tenth to be sold in any one year, the money to be invested in United States bonds, and that

> "No part of said fund shall be expended for university buildings, or the salary of professors or teachers, until the same shall amount to $50,000, and then only shall the interest on said funds be used for either of the foregoing purposes, until the said fund shall amount to $100,000 when any ex-

> cess, and the interest thereof, may be used for the proper establishment and support respectively of said universities."

It will be noticed that by the terms of this grant, specific direction is given as to the securities in which the funds must be invested; also that neither principal nor interest could be used until the fund reached $50,000, and then only the interest could be expended for (a) university buildings; (b) salaries of professors or teachers. After the fund had reached $100,000 the excess as well as the interest might be used for (a) the proper establishment and support of the university. The authority to use any portion of this fund or the interest thereon for university buildings is very carefully eliminatted in the concluding part of the section, the words there used are "establishment and support." The word "establishment" there cannot have the same meaning as a building fund, otherwise the term above employed, conferring the authority to use a part of the income for the construction of a building (if that is the meaning) would not have been eliminated and the word "establishment" used. Furthermore, the buildings were presumed to have been constructed prior to the time when the fund reached $100,000.

This grant is vested in the State of Montana by the provisions of section 14 of the Enabling Act, and the original act is

> "So amended as to provide that none of said lands shall be sold for less than $10.00 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally and the income thereof to be used exclusively for university purposes."

This section of the Enabling Act makes some further amendment of the original act and refers back to section 11 of the Enabling Act. The amendments made bring the entire section (14) within the purview and meaning of section 11 of the Enabling Act, showing clearly that it was the intent of Congress that the provisions of said section 11 apply to the construction of said section 14, as well as to the construction of the original act of 1881. And a reading of our Constitution makes it very clear that the Constitutional convention placed this construction upon said amended grant for the State University. (Sec. 12, Art. XI, above quoted.) And if section 11 of the Enabling Act applies to the grant made for a state university contained in section 14 thereof, it is quite clear that it must have been intended, and does apply, to the land grants "made for other educational purposes" contained in section 17 of said Enabling Act. And this was clearly the construction placed thereon by the Constitutional convention. (Sec. 12 of Art. XI, Const. above quoted.)

Furthermore, said section 14 contains this provision:

> "None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. Schools, colleges and universities provided for in this act, shall forever remain under the exclusive control of the said states, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college or university."

It cannot be contended that this part of section 14

does not refer to all of the land grants made for educational purposes, because the schools, colleges and universities are specifically enumerated, yet the only manner in which that part of the section prohibiting the use of these funds for sectarian purposes is connected with section 17 of the enabling act is by the phrase "herein granted for educational purposes." This is the same phrase that is used in said section 11, and if the use of this phrase in section 14 serves as a connective to bring all of the land grants within the prohibition of section 14, why would it not have the same meaning when used in section 11, for there is no language employed in said section 11 that gives to this phrase any other meaning than that which it has in section 14.

Section 13 of the Enabling Act grants five per centum of the proceeds of the sales of Public lands within the state to the state "to be used as a permanent Fund the interest of which only shall be expended for the support of common schools."

The Act of August 30, 1890, 26 Stat. 417 (U. S. Compiled Stat. 1901, page 3214) authorizes $25,000.00 to be paid out of the treasury of the U. S. to each state and territory for certain educational purposes. Several conditions are attached to this grant or donation among them being

> "And no portion of said money shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings."

These various original acts of congress are not special laws for the sole benefit of Montana but are general laws relating for the most part to all the states and

territories, and each of the laws contains a restriction against the use of the funds for building purposes; and in all of the grants and donations this restriction amounts to a positive prohibition, except the single act of Feb. 18, 1881, and that act is so amended by the Enabling Act as to include this positive prohibition.

It is not only the policy but the settled law of Congress to deal equally with all of the states, for all the states are admitted on an equal footing.

It would require the controling influence of an express congressional provision to that effect, before we would be justified in holding that it was the intention of Congress to wipe out all these restrictions and to give to the State of Montana greater rights and privileges *than was ever granted TO ANY OTHER STATE.*

Public Grants are most strictly construed against the grantee.

(Southerland Stat. Construct. Par. 378 and cases cited.)

If we give the Enabling Act a strict construction or even a liberal construction we may look in vain for provision warranting a conclusion that it was the intention of congress to deal with Montana as though it stood on a superior footing instead of on an equal footing with the other states.

It is idle to say, that the general government has no further interest or concern in the land grants made to Montana, for educational purposes; for surely it's interest in the education and character of it's citizens, is not only great but perpetual. It has a direct interest and purpose to see that the trust is carried out by the state, for it is as much concerned in the education of its people as is the State itself.

## CONSTRUCTION OF THE ENABLING ACT.

Sec. 10 of the enabling act grants to the State of Montana sections numbered 16 and 36 in every township, for the support of common schools, and reads as follows:

> "That upon the admission of each of said states into the union sections numbered sixteen and thirty-six in every township of said proposed state, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivision of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior; *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

And Sec. 11 of the enabling act is as follows:

> "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under

such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

It is apparent from the wording of said Section 11 that it is intended to be a clear and distinct limitation as to all grants of lands mentioned in the enabling act and made *to the state for educational purposes.*

Said Section 11 is an independent section and is connected with the balance of the act of which it is a part, only by the conditions, limitations and permission prescribed and given regarding the disposition of the various land grants mentioned in the act itself. If this section relates only to the grants mentioned in section 10 of the enabling act, why was it necessary to make of it a separate and independent section? In said section 10 the term "common schools" is used, while in section 11 the use of this term is studiously avoided and the term "permanent schools" and "school" are used. Why this switching of terms if only the one grant is meant? The "common school fund" is only a part of the "permanent school fund" for the latter includes all the permanent funds of the various educational institution, as will hereafter appear.

The language employed in said Section 11 is perfectly general. It does not limit the application of the section to any one grant, but makes it equally applicable to all the land grants.

The word "herein" has a distinct and specific meaning. It is defined by all lexicographers to mean "in

this", substituting this acknowledged meaning of the word for the word itself, and the phrase will read "that all lands *in this* granted, etc."

In this what granted? Not is this Section 11, for no grant is made by that section. Certainly not "in this preceding Section 10", nor "in this subsequent Section 17", but "in this act of Congress granted." "The words 'herein provided', or 'not herein provided for', as used in the United States statutes generally, if not always, refer to the act, chapter or title, and not to the section. Before the revision they referred to the act or chapter, but since, more generally, to the title."

May v. Simons, 4 Fed. 499.

The word "herein" relates to the act in which it is found and is not confined to the section in which it is used.

State v. Glenn et al, 7 Heisk, (Tenn.) 472.

The word "herein" as used in tariff and revenue laws of the United States, relates to the entire act.

Arthurs' Executors v. Butterfield, 125 U. S. 70.
Smythe v. Fiske, 90 U. S. 347.
Movious v. Arthur, 95 U. S. 144.

Iasigi v. Iasigi, a Massachusetts case, involved the construction of a will which consisted of twelve articles. In articles 1, 2, 3, 4 and 5, certain bequests and devises were made to the sons. Article 6 provided, "all moneys herein directed to be given to each of my sons * * * shall be held, invested and managed by my said trustee," etc. Article 9 provided "all the rest and residue of my property * * * I give, devise and bequeath to my sons." It was contended that this limitation con-

tained in article 6 applied only to the preceding articles, but the court said "but article 6 is not limited to what precedes. It is a general direction applicable to all moneys which are given to these two sons by the will. The words 'all moneys herein directed', mean both hereinbefore and hereinafter directed."

Iasigi v. Iasigi, 161 Mass. 175.
Parker v. Iasigi, 138 Mass. 416.
In re Pearsons' Estate, 98 Cal., 33 Pac. 451.

Section 17 of the enabling act contains this provision:

"And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the various states may severally provide."

But said Section 17 nowhere contains any direction as to the appropriation or disposition of the funds received from the sale of the lands granted, nor are such directions found anywhere in the Enabling Act except in Sections 11 and 14. Unless, therefore, Section 11, and the prohibitions and restrictions expressed in Section 14 apply to said Section 17, the concluding clause of the latter section is entirely meaningless. In State v. Maynard, State Treasurer, 71 Pac. 775, the Supreme Court of Washington in construing this identical Enabling Act, said:

"If Congress intended Section 11 to be only a limitation to Section 10, and not to apply to the whole act, it was very unfortunate in the use of words to express that intention, even if the making of Section 11 an independent section was an inadvertence. But taking this section as we find it—an independent section—in connection with the general words used, it seems conclusive to our

minds that Congress intended to make it refer, not only to the preceding section, but to the whole act, and the words 'herein' and 'educational' purposes, were used advisedly to refer to all lands granted for such purpose in the whole act. The clause in Section 17 as follows, 'and the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the several respective states may severally provide,' refers to the manner of the holding, appropriating and disposing of the lands, and must be construed with reference to the limitations contained in Section 11 as to the lands granted for educational purposes. The manner of disposing or selling of such lands, and the manner of holding or investment of the proceeds and the appropriation of the interest or income, are subject to the limitations contained in Section 11 of the act. The States of North Dakota, South Dakota, and Montana, have all placed the above construction upon the land grants for normal schools, by adopting constitutional provisions declaring the proceeds of such lands a permanent fund.

See

Const. N. D. Art. 9, Par. 159.
Const. S. D. Art. 8, Par. 7.
Const. Mont. Art. 11, Par. 12.

We think this construction accords with the policy of the Federal Government towards the educational institutions named in the Enabling Act. It does no violence to any of the provisions of the act, and conduces to the permanency of the normal schools."

This same construction is given to this language of the Enabling Act by the Supreme Courts of North Dakota and Idaho.

See also,

State v. McMillan, N. D. 96, N. W. 310.
Roach et al v. Gooding et al, 81 Pac. (Ida.) 642.

The Supreme Court of Montana, in the case at bar, having based its decision upon the conflict between the act of the legislative assembly of Montana and said Section 12 of Article XI of the State Constitution, did not deem it necessary to go into the merits of the question of what effect Section 11 of the Enabling Act had upon said Section 17 thereof. It disposed of such question in the following language:

> "A great deal of consideration was given by counsel to the question whether or not the language of Section 11 of the Enabling Act modifies the language of Section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case." (Opinion of Court at page 32 of Record.)

We respectfully submit that the construction placed upon said Sections 11 and 17 of the Enabling Act by the Supreme Courts of North Dakota, Washington, and Idaho is correct, and that the opinion of the Supreme Court of Montana, in so far as it intimates that said Section 11 does not modify said Section 17 is incorrect.

It is contended by plaintiff in error that the grants named in Section 17 of the Enabling Act are not subject to the limitations expressed in Section 11 of that Act, but are wholly at the will of the State Legislature with reference to the disposition of the funds arising from the sale of the lands granted. If this construction is sustained then said Section 17 is an independent section and the grants therein made are not subject to

any condition for the phrase "for State Normal Schools" or even the phrase "For the establishment and maintaining of State Normal Schools" does not express any condition legally binding on the State.

A grant of land to the state for the purpose named in the act that leaves the state the *sole* judge of when that purpose is accomplished is not a grant on condition.

Mills County v. Railway, 107 U. S. 557;
U. S. v. Louisiana, 127 U. S. 182;
Cook Co. v. Canal Co., 138 U. S. 635.

If then this grant is without condition, the state owns these lands the same as though title had been obtained from some other source. Being the owner of the fee simple, without condition or restriction, the state in the exercise of its sovereign authority can either by constitutional provision or legislative enactment, place a restriction upon the use of these funds.

Section 12 of Article 11 of the State Constitution contains that restriction.

If, on the other hand, the limitations of Section 11 of the Enabling Act apply to the grants for educational purposes enumerated in said Section 17, then it is immaterial whether said Section 12, Article 11 State Constitution is valid or invalid, for the limitations of said Section 11 of the Enabling Act positively prohibits the use of these funds as a building fund.

But said Section 12, Article 11 of the State Constitution, is neither void nor elliptical. It is only a restatement of the conditions and limitation of Section 11 of the Enabling Act, and if additional limitations *are* prescribed, it is a proper exercise of the sovereign power

of the state, at least no one but the United States can complain.

107 U. S. 557, above.
127 U. S. 182, above.

The plaintiff in error asks the court to amend the Enabling Act by striking out the word "herein" and inserting the word "hereinbefore," or the word "therein," where the same occurs in Section 11 of that Act, and to treat Section 12, Article 11, State Constitution, as an ellipsis, and then supply the omitted words, whatever those words are.

If such amendment can be made we will then admit that Section 11 applies only to the grants in Section 10, and if the word "hereinafter" is inserted, the limitations would apply only to subsequent grants. Defendant in error insists that both the Enabling Act and the Constitution should be taken and construed as they are, without any amendment.

Section 10 of the Enabling Act grants lands for common schools. Section 11 is an independent section. Section 12 makes a grant for public buildings. Then follows Section 13 making another donation for common schools, while Section 17 makes another grant for public buildings. We do not know why this order was followed, but it cannot invalidate the act nor change its meaning.

Each of the grants for educational purposes confers upon the state certain rights which had been given to other states by specific acts of congress widely separated in point of time. Section 10 of the Enabling Act has reference to the act of 1864, reserving Section 16 and 36 in each township for school purposes.

The right conferred by Section 13 was initiated by

the act of Congress of 1811 relating to Louisiana, (2 Stat. 641). Section 14 deals with the grant made by the act of 1881, and the title had vested in the Territory of Montana. In dealing with this grant, congress was dealing with lands, the title to which had already passed from the United States and vested in the Territory. The general limitations in Section 11 would not apply to lands already owned by the Territory, hence specific provisions were made in Section 14 and the Territory accepted these provisions before it could be vested with statehood.

Section 16 of the Enabling Act has reference to the act of 1862.

The grants in Section 17 of the Enabling Act are in lieu of the grants made by the Acts of 1841 and 1850. The grant of 1850 was a grant in *presenti* only as to the states named in the act.

Section 2479 et seq., Rev. Stat. U. S. 1878.
Mills County v. Railway, 107 U. S. 557.
U. S. v. Louisiana, 127 U. S. 82.

The grant of 1842 was a grant *in futuro* and never did vest in the State of Montana.

McNee v. Donahue, 142 U. S. 587.

And said Section 17 of the Enabling Act repeals the act of 1841 and declares that the grant of 1850 does not extend to Montana. How then can the State claim any authority from either of these original grants? Neither the act of 1841, nor that of 1850 gave authority to use any part of the funds for the erection of school buildings. The first grant (1841) was for roads, bridges, canals, etc., the second grant (1850) was for the drainage of swamps.

Plaintiff in error claims that by virtue of the provisions of Section 19 of the Enabling Act, which reads as follows, to-wit:

> "That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of the interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto;"

that Section 11 of the Enabling Act, because of the use of the word "unsurveyed," was not intended to limit the grants of land "in quantity" made in Section 17 of said act, and therefore, of necessity, must limit only the grants made in Section 10. But defendant in error insists that the same objections arise in relation to Section 10 when we seek to give the word "unsurveyed" the full force and effect that counsel for plaintiff in error insists upon giving it when used in connection with Section 17, and that for that reason, their conclusion that Section 11 only applies to Section 10 is unsound.

There is nothing whatever in the last clause of Section 11 to indicate that such section was intended to apply only to the grants of land mentioned in Section 10 and not to the grants in Section 17.

The word "unsurveyed" as there used, if it has any force or effect whatever, would apply to unsurveyed lands from which selections might be made by the state when surveyed as well as it would be to unsurveyed lands which when surveyed would be Sections 16 and 36, to which the title of the state would attach without selection.

Until the government survey has been made the location of Section 16 and 36 was just as indefinite and uncertain as was the location of the sections that might be selected by the state for the grants under Section 17.

Especially is this true of the lands granted by Section 10 in lieu of Sections 16 and 36. It is just as impossible to tell from what sections these lieu lands will be selected by the State as it is to tell from what sections the grants in Section 17 will be selected. Therefore, if the word "unsurveyed" in Section 11 has, as claimed by counsel for plaintiff in error, the effect of withdrawing all unsurveyed public land from settlement, prior to its survey and the State's selection therefrom made to satisfy the grants in Section 17, it would also, of necessity, have the effect of withdrawing all the unsurveyed public land from settlement until it had been surveyed and the State had selected the lieu lands granted to it by Section 10.

Prior to the government survey there was no way of determining what particular land was embraced in Section 16 or 36. Private surveys are not recognized by the United States for the purpose of identifying lands granted by it. In the case of United States v. Montana Lumber and Manf. Co., 196 U. S. 573, the Supreme Court of the United States said:

> "The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. Indeed, it would reverse the statutory grant of powers and transfer the location of a section from the government to the railroad company."

If we say that by the use of "unsurveyed" in the last clause of Section 11 that such section was not intended by Congress to apply to the grants of land in quantity for the reason that it is impossible to determine where such lands are located until surveyed and selected under the direction of the Secretary of the Interior, we can also, from the same line of reasoning, say that

said Section 11 was not intended by Congress to apply to the grants of land made by Section 10 where the land has not been surveyed and an exact location of sections 16 and 36 determined.

The last clause of Section 11 was inserted as a general saving clause to prevent future *entries*, under the land laws, of the lands granted to the state. In endeavoring to make the language as comprehensive as possible, the terms, "surveyed and unsurveyed" were used. The sentence would have had just as much force and effect, however, if the word "unsurveyed" had been omitted, as, at that time, no *"entry under the land laws of the United States"* could be made in any event until the land had been surveyed by the government.

Congress in its desire to protect the lands granted as endowments for educational institutions endeavored by Section 11 to guard against possible loss of said land or dissipation of the proceeds received therefrom, and if, in order to fully carry out this intention, and to head off every possible avenue to defeating these grants, in an over-abundance of caution, words not necessary to be used and which under the circumstances were inoperative were inserted therein, they could in no way defeat the objects of the section or impair the force or effect of the necessary and operative words therein used. The plain and unmistakable intention of the section cannot be defeated by the use of a word, which, as used therein is too comprehensive and, therefore, of necessity inoperative. In Holy Trinity Church v. United States, 143 U. S., 259, the court in discussing the rule of interpretation of words and clauses of general meaning, said, "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances sur-

rounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Also see Heydenfeldt v. Daney Gold and Silver M. Co., 93 U. S. 634.

If the word "unsurveyed" as used in said Section 11 is to be given the full force and effect insisted upon by plaintiff in error, then it would defeat the rights of a bona fide settler who had settled upon unsurveyed land at any time in the past, for instance, in the year 1860, 1870 or 1880. For there is no exception whatever in the last clause of Section 11 to the effect that it does not apply to unsurveyed lands upon which settlement had been made by bona fide settlers either prior or subsequent to the passage of said Section 11.

It must of necessity be held that the last clause of Section 11 simply means that when lands are surveyed and open for "*entry* under the land laws of the United States," that those "herein granted" the state and definitely determined and selected, shall not be subject to entry under the land laws of the U. S.

This word "unsurveyed" as used in Section 11 was absolutely inoperative until some future legislation was enacted to put it into effect, as there was no law providing for the making of an *entry* under the land laws upon unsurveyed land. However, Congress by subsequent legislation has put into effect the idea suggested by the word "unsurveyed" as used in Section 11, by enacting a law which provides that the Governor may make application for a survey of unsurveyed lands "with a view to satisfy the public land grants made by

the several acts admitting the said states into the Union to the extent of the full quantity of land called for thereby;" and that upon the filing of the application for the survey, the lands that may be found to fall within the limits of such townships, as ascertained by the survey, shall be reserved from any adverse appropriation by settlement or otherwise, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the plat of survey.

See Act of Aug. 18, 1894, 28 Stat. 372.

This is the only law which makes the word "unsurveyed" in Section 11 operative by providing for the making of an application for *entry* prior to the survey of the land and this privilege is given only to the States. Furthermore, the state's title to 16 and 36 could not attach to any particular tract of land until it had been definitely located by official survey duly approved, and the state's title to grants of land in quantity could not attach to any particular tract of land until it had been surveyed and duly selected under the directions of the Secretary of the Interior. In neither case was the grant fully completed so that the land could be sold or leased by the state, until the above acts had been fully consummated, and in either case it was only when such acts had been consummated, and title attached to the particular tract of land that the land can be considered as "granted for educational purposes" as that phrase is used in Section 11. Section 11 says "all lands herein granted for educational purposes," etc. This means lands to which the title of the state had attached—all acts being consummated. That is, the grant was completed by the lands having been surveyed and found to be sections 16 and 36, or surveyed and duly selected by the state.

The last clause of Section 11 says "and such lands," etc. To what does the words "such lands" refer? Either to the lands that may "be leased for periods of not more than five years," or "all lands herein granted," and in either case it would be referring to the lands, the grants of which had been fully completed and the title of the state thereto fully attached.

So when it is said "and such lands shall not be subject to pre-emption, homestead entry, etc." It means those lands to which the state's title has fully attached by reason of the land having been definitely located, whether it be lands granted in quantity or sections 16 and 36. It could not mean anything else for the reason that it says "all lands herein granted * * * shall be disposed of only at public sale. * * * But said lands may be leased," etc. Certainly it will not be contended that the state can sell or lease either sections 16 or 36 or lands granted in quantity prior to the survey thereof and the attaching of title to the particular tract to be sold or leased.

So there is no merit whatever in the contention that by the use of the word "unsurveyed" in Section 11 it must be held to apply only to Section 10 and not to other grants for educational purposes, for the reason that any argument advanced to show that it does not apply to grants in quantity may be urged with equal force to show that it does not apply to grants including indemnity lands, mentioned in Section 10 prior to the survey of the land.

Defendant in error does not claim that the effect of "unsurveyed" as used in Section 11 was to prevent settlers from acquiring rights upon unsurveyed lands which would be superior to the State's right, should it attempt to select the lands, so settled upon, to satisfy the grants in quantity. We do not believe Congress

had any such intention at the time it enacted Section 11 of the Enabling Act. But on the other hand we also insist that Congress never intended by Section 11 to prevent settlers from acquiring rights upon unsurveyed land which, when surveyed, would be located in section 16 and 36; or that by Section 11 Congress intended that the indemnity lands granted to the State in Section 10 were not to be subject to settlement by bona fide settlers prior to the survey of the land and the selection of such lieu lands by the State.

The above illustrations clearly show that in no event can the word "unsurveyed" be given the force and effect that plaintiff in error asks the court to give it when construed in connection with Section 17. For if it is, we are forced to the conclusion that it was not intended to apply to either Section 10 or Section 17 of the Enabling Act.

Therefore we submit that it cannot be held that, by the use of "unsurveyed" therein, Section 11 was intended to apply to Section 10, and not to Section 17. The absurdity is as great in the one instance as the other. We must either hold that because of the word "unsurveyed," Section 11 was not intended to be a limitation upon either Section 10 or 17, or we must hold that the word as there used is inoperative, by reason of the general law governing settlements upon unsurveyed lands and that, therefore, Section 11 applies with as much force to Section 17 as it does to Section 10.

If we hold that Section 11 does not apply to either Section 10 or 17 because of the word "unsurveyed" therein, then the whole of Section 11 becomes a nullity and ceases to be a limitation upon any of the grants mentioned in the Enabling Act.

But by giving to the word "unsurveyed" in Section 11

the construction given to that word, as used in the Enabling Act of Nevada, by the United States Supreme Court in Heydenfelt v. Gold & Silver Mining Co., 93 U. S. 634, the section would stand and be a limitation upon all grants for educational purposes after the lands had been surveyed and selected and the title of the State fully attached thereto.

The opinion in the Heydenfelt case, by holding that the word "unsurveyed" can not apply to Sections 16 and 36 prior to survey, completely answers the argument plaintiff in error attempts to make upon the use of the word "unsurveyed" in Section 11 of the Enabling Act.

Also Mining Co. v. Consolidated Mining Co., 102 U. S. 167.

The Act of Congress of 1891 is not an act to amend Section 11 of the Enabling Act, but an act to amend Section 2275, Rev. Stat. U. S. for the purpose of giving the state an option of selecting other lands in lieu of state lands located on Indian and Military Reservations and mineral lands.

U. S. Comp. Stats. 1901, p. 1381.

Moreover, if relator's contention, that the Enabling Act is a contract, is correct, it is beyond the power of Congress to amend that act in any respect whatsoever, and there is nothing in this amendatory act of 1891 to indicate that congress had in mind Section 11 of the Enabling Act. The amendatory act amended the general statutes without reference to any particular state.

Therefore, the act amending Section 2275 of Revised Statutes of U. S. can in no way whatever be considered as a construction placed by Congress upon said Section 11.

Much stress is laid upon the words "establishment and maintenance" as used in that portion of Section 17 of the Enabling Act, which grants lands to Montana for educational purposes. The grant "for state normal schools" is as clear and explicit as language can make it. The sentence is complete, and is neither elliptical or ambiguous, and by it there is granted to the State of Montana one hundred thousand acres "for State Normal Schools." Grammatical rules do not demand that the words "establish and maintenance" be considered as omitted and treated as though actually used as a part of the language of this grant, as contended by counsel for plaintiff in error. If there is any such rule of grammar, we should like to have it more definitely pointed out. The legislative intent is clear so far as this grant is concerned. One hundred thousand acres of land is granted to Montana to be held and disposed of as the legislature may prescribe, provided, that it shall not disregard the limitations and restrictions placed upon it by the provisions of the grant itself and of the state constitution. However, it is claimed that such words, as there used, include the erection of buildings. While the words "establishment and maintenance" are not used in connection with the grant of lands for said normal schools, as above shown, and from the punctuation used in said Section 17 cannot by any rules of construction be read in as a part of such grant, what would be the effect upon such grant if such words were construed to apply thereto.

As is pointed out elsewhere in this brief, the uniform policy of Congress in making grants of land for educational purposes has been to limit the use of the land so granted and the proceeds derived therefrom to the support and maintenance of such institutions, and to

expressly provide that the same shall not be used to erect school buildings. Does Section 17 of the Enabling Act by the use of the word "establishment," if that word is to be construed in connection with the normal school grant, change the unbroken policy of Congress heretofore followed in making such grants? Webster defines the word "establish" as follows:

"(1) To make stable or firm; to fix or set unalterably; to settle or confirm.

(4) To originate and secure the permanent existence of; to found; to institute; said of a colony, a state, and other institutions."

The word "establishment" as used in the phrase "for the establishment and maintenance of" is defined by Webster, as follows:

"1. The act of establishing, founding, ratifying, or ordaining; settlement; confirmation.

2. The state of being established, founded, and the like.

3. That which is established; as, (a) A form of government, civil or ecclesiastical. (b) A permanent, civil, military, or commercial force or organization. (c) A style of living; accustomed expense; *fixed allowance* or *resources for subsistence; income;* salary."

To the same effect see Century and Bouvier dictionaries. The latter also says: "that 'establishment' is also used to denote the settlement of dower by the husband upon his wife." The standard dictionary defines "establishment" as follows:

"A settlement in life; particularly, a fixed allow-

ance or income." None of the above definitions of "establish" or "establishment" give such words a meaning synonymous with "build", "erect" or "construct." The words "establish" and "establishment" standing alone are never construed in the sense of "to construct" or "to erect" buildings. They are used in connection with incorporeal rather than corporeal things.

The Supreme Court of New York in 79 N. Y. Sup. 418, in construing the phrase "The Board of Sewer Commissioners of the Village may establish and maintain a sewer system therein," said: "The word 'establish' is not used in the sense of 'to construct' and that is not its meaning etymologically." It is true that some courts in construing the word "establish" or "establishment" have held that the words were used in the sense of "to construct or erect" buildings. Such a construction was given in the cases of Attorney General v. Hull, 9 Hare, 647, reported in Vol. 41 of Chancery Reports, 647. Ketcham v. City of Buffalo, 31 Barb. (N. Y.) 298; Buckram v. People, 27 Barb. (N. Y.) 264, and a few others.

However, upon an examination of all these cases it is found that where the words were held to have such a meaning, it was based wholly upon the context of the act in which they were used and which clearly modified the usual and ordinary meaning of the words. The word "establishment" as used in the Section 17 of the Enabling Act when construed according to its meaning etymologically, cannot be held to authorize the "erection" or "construction" of buildings. However, the word is employed by legislators in so many different senses that in almost every instance where it is used we have to look to the context to determine the particular meaning intended.

Cyc. Vol. 16, p. 591, in defining the word "establish" says:

> "It has been said that upon few words could there be more room for argument than upon this word; it has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by its context."

If, as is shown above, the word "establishment" when construed according to its technical meaning does not mean to "construct" or "erect" buildings, does the context of the Enabling Act justify such a construction of the word? As is shown above in this brief, section 11 of the Enabling Act must be read in connection with and modifies all sections of the Enabling Act which grant lands to the state for educational purposes. The wording of said section 11 settles all doubt as to the meaning intended by the word "establishment," as used in said section 17, for section 11 provides that the proceeds received from the lands granted for educational purposes shall

> "constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."

The proceeds from the lands granted by said section 17, in order to constitute a permanent fund, the interest only of which shall be used, must never be taken to erect school buildings that will decay and diminish in value and from which no interest would be received to be expended in support of said schools. To put money into school buildings which are not intended to yield any interest or income is not using such money so as to constitute a "fund" as that word is defined by Webster, Century and Bouvier dictionaries, or by the courts.

See "Words and Phrases," Vol. 4, p. 3004.

Said section 11 further provides that the interest received from such permanent fund shall be used only for certain purposes, namely, the support of said schools, and the authorities all hold that the word "support" as there used, does not include the construction or erection of buildings. Section 11 clearly shows, beyond any question of doubt, that the lands granted to the state for educational purposes were intended as an endowment, and that the proceeds therefrom were to constitute a permanent endowment fund. Hence it is clear from the context of the Enabling Act that the phrase "for the establishment and maintenance of" as used in section 17 means "for the *endowment* and *maintenance* of."

See Stroud's Judicial dictionary, which, in defining "establish" says: "compare 'endow,' and in defining 'endow' says: "compare 'establish.'" The authorities all hold that "maintenance" means the running or current expenses, and does not include the construction of buildings.

Sheldon v. Purdy, 49 Pac. (Wash.) 230.
Mitchell v. Colgin, 54 Pac. (Cal.) 905.
Roach v. Gooding, 81 Pac. (Ida.) 644.

By construing the word "establishment" to mean "endowment," it is then in harmony with the context of the entire Enabling Act, and is also in harmony with the theretofore unbroken policy of Congress in making grants of land to states for educational institutions.

Sec. 4660 of the Civil Code of Montana, embodies the well settled rule of construction, that

> "Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate

> meaning in law, are to be construed according to such peculiar and appropriate meaning and definition."

"Establishment" when construed according to the usage of the word as defined by the dictionaries, or when construed by the context of the Enabling Act, cannot be held to mean "to construct or to erect buildings." Said section 11 is a clear and distinct limitation upon the grants of land to the state for *educational purposes.* "Establishment" by reason of the various meanings and senses in which it is used, is not a clear and distinct word, and cannot control the clear and distinct limitations contained in section 11 of the same act. The rule of construction is well settled that

> "A clear and distinct limitation in a grant is not controlled by other words less clear and distinct."

The construction placed by the Constitutional Convention of Montana upon all the grants of land in the Enabling Act for educational purposes was that they constitute an endowment for the support, maintenance and perpetuation of such institutions. Sections 2, 3 and 12 of Art. XI of the State Constitution clearly show that the Constitutional Convention never intended that the proceeds received from such grants should ever be pledged or used for the purposes of erecting school buildings. In fact such sections of the constitution expressly prohibit such use of the funds. Section 8 of the Enabling Act provides that in the formation of the State Constitution, all provisions of the Enabling Act must be complied with, and that, upon such compliance, the President must issue his proclamation admitting the state into the Union. The fact that our constitution was approved and the state admitted shows conclusively

that the construction of the Enabling Act adopted by the framers of our constitution was the construction thereof intended by Congress. Congress certainly expected and intended that the legislature would enact laws not in conflict with the state constitution which had been adopted in conformity with the provisions of the Enabling Act and approved by Congress through the President.

## CONSTITUTION.

This brings us to the consideration of the provisions of the state constitution relating to the land grants for educational purposes. Is chapter 3, Laws of 1905 (set out in appendix to brief of plaintiff in error), providing for additional buildings and equipment for the State Normal College, in conflict with our constitution? Does it violate the plain provision of section 3 and section 12 of Art. XI? If it does, it is unconstitutional, regardless of the provisions of the Enabling Act. For, when the constitution was adopted and approved by Congress, it became the supreme law of this state and any act passed by the legislature relating to land grants for educational purposes must not only conform to the provisions of the Enabling Act, but also to all the provisions of the constitution relating thereto.

If the constitution throws around the funds in question additional safeguards and limitations, which are not repugnant to those contained in the Enabling Act, they control and must not be violated.

Section 2 of Article XI of the constitution defines the "public school fund of the state," and reads as follows:

"The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands; and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general governmnet for general educational purposes, or where no other special purposes is indicated in such grant," etc.

This fund consists not only of proceeds from the sale of sections 16 and 36 granted for the support of the "common schools" but also of the proceeds from the sale of lands granted for the maintenance of the various educational institutions of the state. Each of these educational institutions is a part of the public school system of the state, as well as the common or district schools. The Supreme Court of Idaho, in Roach v. Gooding, above, in construing section 4 of Article IX of their constitution, which is the same as said section 2 of Article XI of our constitution, said:

"The provisions of section 4, Article IX of our constitution, are broad enough to include all grants for educational purposes; and, after declaring of what moneys the public school fund of the state shall consist, said section provides inter alia that all other grants of land or money made to the state from the general government for educational purposes shall constitute the public school fund. The public schools of this state include the little log cabin in the remote districts, as well as the magnificent normal schools, the academy, and the State University. The university is as much a public school as is the district school. * * * And so the University of Idaho crowns the great public school system of our fair young state."

Section 3, Article XI of our constitution says:

> "Such public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state, including school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law."

This section refers to the public school fund defined in said section 2, and provides that the same shall "remain inviolate, guaranteed by the state against loss or diversion." It further provides how such fund "shall be invested," namely, "*so far as possible in public securities within the state.*" It is apparent from the reading of this section that it was intended that such public school fund was to be invested only in public securities, and, that the public securities within the state were to be given preference. There is no conflict between said sections 2 and 3 and section 5 of said Article XI.

Said section 5 reads as follows:

> "The interest on all invested school funds of the state, and all rents accruing from the leasing of any school lands, shall be apportioned to the several school districts of the state in proportion to the number of children and youths between the ages of six and twenty-one years, residing therein respectively, but no district shall be entitled to such distributive share that does not maintain a public free school for at least three months during the year for which distribution shall be made."

The context of said section 5 clearly shows that it simply provides "for the apportionment to the several

school districts" of the rent received from the lands granted for the support of the "common schools," and of the interest received from the investment of that portion of the "public school fund," defined in said section 2, which is derived from the sale of the lands granted for the support of the "common schools" by section 10 and section 13 of the Enabling Act. But said section 5 in no way conflicts with said section 3 which expressly declares that all the public school funds shall remain inviolate, guaranteed against loss or diversion and then provides how the fund shall be invested.

The public school fund shall "remain inviolate."

"The word 'inviolate' is defined by approved lexicographers to mean 'unhurt, uninjured, unpolluted, unbroken.' 'Inviolate,' says Webster, is derived from the Latin word 'Inviolatus,' which is defined by Ainsworth to mean 'not corrupted, immaculate, unhurt, untouched.'"

4 Words and Phrases, 3759.

Flint River Steamboat Company v. Roberts, 2 Flor. 114, 48 Am. Dec. 178.

Would the taking of money out of said public school fund and using it to erect school buildings leave the fund "unhurt, uninjured, unbroken, untouched?" That it would not, is self evident,—especially when we consider that buildings must necessarily crumble and decay; that the ravages of time and the elements will within the period of a few generations totally destroy the value of such buildings. This public school fund was not intended for the exclusive use of the present generation, but as a permanent fund, the interest from which to be used for the support and maintenance of the schools and colleges, not only of the present, but of all

future generations. There can be no question but what the use of the money for the erection of public school buildings would result "in the loss or diversion of the fund." It would be inevitable. Said section 3 provides that the "fund" must be "invested." To sell the lands and invest the money in public school buildings, would not be creating a public school fund, such as was intended by the constitution. The word "fund" as here used means *money* or *public securities*. See Webster, Century and Bouvier dictionaries, also 4 Words and Phrases, 3004.

Putting money into public school buildings, which never produce any interest or income on the money expended in their erection, is not an investment of such money in the sense that the word "invest" is used in said section 3. All the public school buildings in the state are erected and maintained at the expense of the state for the purpose of giving *free education* to the children of the state.

They are not intended to be revenue producing investments. The word "invested" is defined by the Century dictionary, when used as an intransitive verb, as follows: "To make an investment; as, to invest in railway shares;" and by Webster as follows: "To make an investment; as, to invest in stocks." The Century dictionary defines "investment" as follows: "An investing of money or capital; expenditure for profit or future benefit; a placing or conversion of capital in a way intended to secure an *income* or *profit* from its investment; as, land, or the like; to make safe investment of one's property."

The meaning of the word "investment" is fully considered and discussed in the case of Savings Bank v.

Barrett, 58 Pac. (Cal.) 915. See also 4 Words and Phrases, 3755.

Furthermore, the framers of our constitution, in an abundance of caution, in order to prevent any possible misconstruction by the legislators or courts, of said sections 2 and 3 of Article XI, and to make it absolutely certain that the proceeds received from the lands granted to the State University and other institutions of learning should constitute a fund to forever remain inviolate, added section 12 to said Article XI. (Page 4 of this brief.)

It says, "The various funds shall be respectively invested." Here again the words "fund" and "invested" must be construed according to their usual and ordinary meaning as defined above in this brief.

> "The interest of said invested funds * * * shall be devoted to the maintenance and perpetuation of these respective institutions."

How could there be any "interest of said invested funds" if the money was used to erect non-revenue producing public school buildings? The use of the word "interest" in this section shows how and for what purpose it was intended that the fund should be invested. The same intention is here shown as that indicated in said section 3 which provides for the investment of the fund in public securities, which are always interest bearing investments. Furthermore, said section 12 clearly shows that the land grants for the State University and all other institutions of learning were construed by the framers of the constitution to be endowments for such institutions.

If the fund created from the sale of these lands is to forever remain inviolate; the same to be invested and only the interest and rents to be used and this use

limited to the maintenance and perpetuation of the institutions; certainly all the elements of an endowment fund are contained therein. All the safeguards for the protection of an endowment fund are there set out, in unmistakeable language. Any act of the legislature to divert this fund, or to pledge or expend it in any manner, except as an investment which will produce interest and revenue and keep the fund permanent and inviolate, is absolutely unconstitutional; and any act which authorizes the use of the interest received from the investment of such fund for any other purpose than the maintenance and perpetuation of the institution is absolutely unconstitutional.

The words "maintenance, perpetuation and support" of schools do not include the erection of buildings.

Sheldon v. Purdy, above.
Mitchell v. Colgin, above.
Roach v. Gooding, above.

Said chapter 3, Laws of 1905, which attempts to divert these funds by pledging them for the payment of bonds issued for the purpose of securing money to erect school buildings, is in direct violation of all the provisions of said section 12 and also of said section 3 of Article XI, and therefore unconstitutional, and all bonds issued in pursuance thereof are invalid.

## WHY WERE LIMITATIONS IMPOSED UPON GRANTS FOR EDUCATIONAL PURPOSES BY CONGRESS IN THE ENABLING ACT, AND BY THE CONSTITUTIONAL CONVENTION IN THE CONSTITUTION?

Ever since the organization of our national government Congress has been making grants of land to new

states for the support of the public school system. At first these grants were made without any limitation upon the state as to the price for which the state might sell the land, and later Congress fixed a minimum price at the small sum of $2.50 per acre for which such lands might be sold. (See 12 Stat. at Large, p. 482, U. S. Compiled Statutes, p. 3213, 21 Stat. at Large, p. 326.) It was soon found, however, that under such land grants the states, in their desire to convert such lands into money, were disposed to sell the same at once without waiting until the lands, by reason of increased population, would increase in value; thus the lands would soon be disposed of by the state and the fund derived therefrom would be wholly insufficient as an endowment for the future support, maintenance and perpetuation of such institutions.

It was also discovered that the members of the legislatures of states receiving such land grants, urged on by the members thereof coming from counties of the state in which said educational institutions had been located, were disposed to enact laws authorizing the erection of magnificent school buildings in such localities before the population of the state actually justified or required them, and that in order to raise the money necessary to erect such expensive buildings, without imposing burdensome taxes on the sparse population of the new state, the legislatures would invariably seek to divert the money received from the sale of the lands granted to the state as an endowment for the support of the public schools and use it in the erection of such buildings.

Instead of appropriating money from the state treasury for the erection of school buildings as *actually needed* or of issuing bonds of the State of Montana, at

a low rate of interest, if necessary in order to raise the money when needed for such purposes, and thereby leave the interest and income from the endowment fund for the support of such schools, the tendency always has been to divert the endowment fund either by pledging it for the payment of bonds issued in the name of the institution, at a high rate of interest, for the purpose of raising the money to construct buildings or by paying it out direct for such purpose, and thus making it necessary to provide for the support of such school by direct taxation.

In discussing land grants and constitutional provisions similar to those of our state, the Supreme Court of Idaho, in Roach vs. Gooding, 81 Pac., p. 645, said:

> "As is clearly shown from the various acts of Congress from that of July 2, 1862, including the Act of February 18 ,1881, and the amendments thereof, and the acts of admission, admitting many states into the Union, the general attitude and policy of Congress has been to provide an endowment fund for educational purposes; the income thereof only to be used to support the institution, leaving the people of the state to furnish the buildings. Observation and experience have shown that that is a correct policy, for the history of the various states shows that the inclination of the several legislatures has been to use a great portion of such grants to erect magnificent buildings for school purposes, regardless of the necessity for such buildings. Even in our own state numerous attempts have been made by the legislature to pledge or pawn not only the interest and income of the proceeds of such lands, but the proceeds as well, in the erection, construction, and equipment of buildings."

It was for the purpose of checking this tendency of legislatures and citizens of the state to divert the perma-

nent school fund—the endowment for our public school system,—that the clear and distinct limitations upon the use of the proceeds from the land grants for educational purposes were inserted into the Enabling Act and state constitution.

Notwithstanding the fact that Congress deemed it necessary to place limitations upon the price for which lands granted to the states for educational purposes might be sold, and also upon the use of the proceeds received from such sales, and even in the Enabling Act, as is admitted by plaintiff in error, placed such limitations upon the grants made by sections 10 and 14 thereof, still plaintiff in error insists that in the same Enabling Act, Congress, by section 17, granted an aggregate of 1,900,000 acres to four states, without any limitations whatsoever.

Such a construction is absolutely inconsistent with the policy of Congress in dealing with grants of land for educational purposes, and should be sustained only upon clear, distinct and unmistakeable language, subject to no other reasonable construction.

What is the inevitable result of taking or pledging the proceeds received from such land grants for the erection of school buildings and providing furniture therefor? The money is placed in property not "permanent," that will not "forever remain inviolate." This property does not produce any interest or income to be used in the support, maintenance and perpetuation of the institution. In order to provide for the support, maintenance and perpetuation of such institutions resort must necessarily be had to direct taxation, and this direct taxation for the support of the schools must necessarily go on forever, as the proceeds received from the sales of the lands would all be diverted

and forever tied up in buildings that produce no revenue; then, sooner or later, these buildings would decay and the taxpayers of some future generation would be required, by direct taxation, to raise the money to rebuild them.

If we are not to wholly disregard the plain intention of Congress and of our Constitutional Convention to establish and maintain our public school system on a broad, permanent and self-supporting basis that would continue so long as the State of Montana exists, and are to look only to our selfish ends, and to consider only the welfare of the schools and school children of this generation, and leave future generations to provide for the education of their children as best they may, then and in that event it may be proper to continue the policy of handling the land grants for educational purposes that has been followed since our admission into the Union.

If, because our Enabling Act and constitution have been misconstrued and violated in the past we are to consider them a dead letter and wholly disregard them in the future, then it may be proper to continue our present policy of handling the public school fund. If the violation of the plain provisions of the constitution for a period of a few years has the effect of repealing and nullifying the constitution, or any part of it, then the position of plaintiff in error in this case may have some merit in it.

We submit, however, that it is the duty of the legislatures, courts and public officers of this state to see that the provisions of our constitution and Enabling Act are carried out. They were enacted not in a spirit of selfishness or of personal interest, but for the purpose of laying the broad foundation of a state government that

is supposed to endure forever. They must necessarily make provision for the future as well as for the present. The constitution is the supreme law of the land and the safeguard which protects future generations against the enactments of laws of a temporary and doubtful benefit to satisfy some popular clamor of the hour or of special legislation to satisfy the present demands of a few favored cities at the expense of the future welfare of the people of the state.

It may be claimed, however, that the money received by the new state from taxation would not be sufficient to permit of appropriations therefrom for the purpose of erecting school buildings as their necessity developed, and that the state did not have sufficient resources to issue state bonds for such purposes. The state might as well issue such bonds and levy taxes and create a sinking fund and pay the interest thereon as to issue bonds against the land grants and pledge for the payment thereof the interest intended for the support of the schools. When this interest from the investment of the proceeds received from the land grants is used to pay interest on bonds, then there must be appropriated from the state treasury just that much more for the support of the schools; so the taxpayer, in effect, pays the interest on the bonds in either case. The taxable resources of the state have to bear the burden whether the bonds are issued in the name of the state or in the name of the state institutions of learning and secured only by the land grants of such institutions.

If, by reason of the limited resources of the new state, it is claimed to be *expedient* to issue bonds against the lands granted state institutions of learning for the purpose of receiving money to erect buildings for such institutions, then, by reason of the limited resources of

each new school district in a county, it would be *expedient* to issue bonds against sections 16 and 36 and pledge the proceeds therefrom for the purpose of erecting school buildings in such new district. There is as much authority under the Enabling Act and constitution for doing the latter as there is for the former.

By following the plain mandatory provisions of our state constitution and adhering strictly to the safely guarded policy laid down by it and our Enabling Act for the management and investment of the funds received from the land grants for educational purposes, we will obtain the following results:

Section 17 of the Enabling Act grants to the state "for state normal schools, one hundred thousand acres." This land cannot be sold for less than ten dollars per acre if section 11 of the Enabling Act controls. It is all selected lands personally inspected by agents of the state. Within a few years, with the natural increase of population, all this grant of one hundred thousand acres can be sold for ten dollars or more per acre. If the proceeds from such sales are placed in a permanent fund and held inviolate there will then be the magnificent fund of at least one million dollars as an endowment for the support, maintenance and perpetuation of the State Normal College. This fund invested, as provided in the constitution, at a rate of interest of four per cent, would provide an annual income of forty thousand dollars for the support, maintenance and perpetuation of this college, and not for one year or fifty years but for as long as the State of Montana has a normal college to support and maintain. When this land is all sold and the fund thus invested, the taxpayer will be relieved from the burden of supporting this institution for all future time. Thus, after a few years to come,

instead of the legislature making an annual appropriation out of the general tax levy of twenty-nine thousand dollars for the maintenance of the normal college, as is now done, there will be an annual income from the investment of this permanent fund sufficient for such maintenance.

What is here said of the normal college applies equally to all the other educational institutions of the state.

This will be the result of following the statesmanlike policy laid down by the Enabling Act and our constitution for the development and permanent establishment of the public school system of our state. That it is the true policy, perfected from the experience of the past, is beyond question of a doubt. On the other hand, the policy pursued by the state, in violation of such provisions of the Enabling Act and constitution, must necessarily result in injury to the public school system and make the maintenance of the same a burdensome and perpetual expense upon the taxpayers for all future time.

In the case of State v. McMillan, cited above, the validity of bonds of state institutions to the amount of $741,000 was involved. In speaking of the legislative policy of handling the public school funds as distinguished from the policy laid down by the constitution and Enabling Act, the court used the following language:

> "Indeed, it is not too much to say that it was the legislative purpose, in authorizing the issuance of this class of bonds, to have the permanent educational funds invested in them. In yielding to this legislative policy, the board was clearly in error, and in doing so violated the plain provisions of the constitution, which marked the limit of their au-

thority and prescribed their duty. When the constitution speaks, its voice is supreme, and its mandates are to be obeyed by all departments and all officers of the state government.

"The members of this court are not unmindful of the embarrassment to this and other state institutions which are looking to moneys derived from these proposed loans for buildings and improvements which will follow our decision. This will be temporary, however, and is of small consequence compared with the permanent injury which would be done to the people of the state if the court, to which they have committed the preservation of their constitutional rights and the integrity of the constitution itself, should fail in the performance of their duty."

## LEGISLATIVE AND EXECUTIVE.

### *Construction of Act.*

It has been seriously and earnestly suggested and urged, and may be brought to the attention of this court in argument, that without reference to the express and solemn language of the Enabling Act and constitution, the state having benefitted by this system of bonding the land grants donated to it for educational purposes, the court might properly place the construction upon the act of the legislature which has been placed thereon by the legislative assembly, and the State Board of Land Commissioners in the past. This sort of argument begs the question and is in disregard of the solemn mandates of the Enabling Act and constitution of the State of Montana, which must govern, no matter what the effect may be, or how far reaching the results of a decision. The supreme law, the constitution, must be upheld and its mandates followed.

The true rule is stated in Cooley's Constitutional Limitations, page 83, as follows:

> "Contemporary construction * * * can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitation; it can never enlarge its natural boundary. * * * Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed tribunals to enforce it."

See also, Fairbanks v. U. S. 181 U. S. pp. 285 to 289 and 306 to 312.

## IS LEGISLATURE AN AGENT?

The lands and proceeds which are sought here to be dissipated were granted to the State of Montana; the grant was not made to an officer of the State, or to an individual, or to the legislature. Note the language of section 17 of the grant: "That * * * the following grants of land are hereby made to-wit: * * * *To the State of Montana* * * * for state normal schools one hundred thousand acres." (Italics are ours.)

The State of Montana could have no existence were it not for the constitution; not only would there be no State of Montana, but there would be no legislature of such State were it not for the constitution; both the legislature and the State itself exist only by virtue of the constitution which fact was and must have been contemplated by congress in making the grant.

The last paragraph of section 17 of the Enabling Act provides, "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legis-

lature of the respective states may severally provide."

The central idea advanced by plaintiff in error, as we understand it, is that by this concluding clause of Section 17 of the Enabling Act, the congress designated and appointed the state legislature as the agent of the United States for the purpose of disposing of the land grants made and enumerated in said section 17. On page 33 of his brief, counsel states this proposition:

> "If an officer of the United States had been named, for instance, the Secretary of the Interior, no one would be found to assert that that authority granted to him by an act of Congress could be controlled by the constitution of the state."

There are two answers to this proposition. First, Congress has not done anything of the kind. Second, if Congress should attempt to make a grant of land and then provide as a condition of the grant that the same should be disposed of according to the will of an agent of the government without regard to the will of the grantee, such act would not have the effect of a grant at all, but would only be an authorization to the agent to dispose of the property named in the act for the benefit of the party named as grantee, according to the will and judgment of such agent.

Neither a state court, nor an act of Congress can coerce a legislature to action, nor control its action. A court may pronounce its laws void, but neither court nor Congress can compel it to enact a new law nor amend an old one. An action could not be maintained in any court against the state legislature, for the legislature is not an entity and has no existence except as a department of the state government under *the state constitution*, and an action against the state would be of no avail for the state is only a silent, passive recipient

according to the will of this supreme legislative agent. If then the plaintiff in error is correct, the Congress has named as an agent of the United States an agency that is neither a natural nor an artificial person and that is beyond the control of the appointing power.

A legislature can act only through the operation of laws legally enacted by it.

Section 12, Article VII of the state constitution reads, in part:

> "Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law, and if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house by which it shall likewise be reconsidered, and if approved by two-thirds of the members present in that house it shall become a law, notwithstanding the objections of the governor."

Section 40 of Article 5 of the state constitution contains the same provisions relative to every order, resolution or vote in which the concurrence of both houses may be necessary, except on the question of adjournment or relating to the salary and the transaction of the business of the two houses.

If then this legislative agent should enact a law relative to the disposition of these lands, that act would have to be submitted to the governor. (Unless this provision of the state constitution is also void as being in violation of said section 17 of the Enabling Act.) This agent would then have to submit its action for approval to one who is not named as an agent or given any author-

ity by the Enabling Act, and this law so enacted would be a state law, not a federal law. It would be executed by the state officials, not by federal officials, and rights arising respecting it would be adjudged in state courts, not in federal courts. It seems to us incredible that an act of the state legislature which so vitally affects the greatest interests of the state, which must be executed by state officials and enforced by state courts should be so superior to the state itself that it cannot be interpreted, construed or passed upon by the courts that must be appealed to adjust all rights arising thereunder. Especially is this true when a legislative act is in direct conflict with so many positive provisions of the fundamental law of the state which created both the court and the legislature.

Clearly the parties to this grant are the United States, as grantor, and the whole State of Montana as grantee—not the United States and some one department of the state government. The legislature is named in the Enabling Act solely because it is that department of the state government vested by the state constitution with the power of enacting laws for the disposition of state property, but the whole state, and not one department thereof, is the grantee.

If, instead of this concluding clause of said section 17, Congress had said "and the governors of said states shall carefully enforce all laws enacted by the respective legislatures relative to said grants" no one would contend that the governor could act arbitrarily in the matter or that the validity of his acts under the state law and constitution could not be enquired into by the state courts.

Plaintiff in error quotes from State v. Cook, 17 Mont. 329, a case relating to the State Capitol Commission.

The only question presented and determined by the court in this case was: Can the state issue bonds and pledge the land grants made by Congress for *public buildings* at the state capital for the payment thereof? In the discussion of this question, however, the court used this language:

> "We know of no constitutional limitation upon the price for which lands granted by Congress to the state may be disposed of for the erection of public buildings at the capital. The limitations created by the Enabling Act relates to lands granted for educational purposes."

In no case, however, was the question involved in the case at bar assigned, discussed or presented by counsel, or decided by the Montana court.

For the reasons and upon the authorities above cited, we respectfully submit that the decision of the Supreme Court of Montana in holding that the act of the legislative assembly of the State of Montana, approved February 2nd, 1905, to be in violation of the state constitution was correct and should be affirmed, and also that said act of the legislative assembly is in violation of the Enabling Act and that said opinion of the Supreme Court of Montana should also be affirmed upon that ground.

Respectfully submitted,

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 252.

THE STATE OF MONTANA, *ex. rel.*,
CHARLES S. HAIRE,
*Plaintiff in Error,*

*vs.*

JAMES H. RICE, AS STATE TREASURER,
*Defendant in Error.*

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Sections 10 to 19, inclusive, of Montana Enabling Act.
(25 Stat. 676, 679-682.)

SEC. 10. That upon the admission of each of said States, into the Union sections numbered sixteen and thirty-six every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the sections in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States, in such man-

ner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SEC. 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said States, to be selected and located in legal subdivisions as provided in section ten of this act, shall be, and are hereby granted to said States, for the purpose of erecting public buildings at the capital of said States for legislative, executive, and judicial purposes.

SEC. 13. That five per centum of the proceeds of the sales of public lands, lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

SEC. 14. That the lands granted to the Territories of Dakota and Montana by the Act of February eighteenth, eighteen hundred and eighty-one, entitled "An Act to

Grant Lands to Dakota, Montana, Arizona, Idaho and Wyoming, for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold for less than ten dollars per acre; but said lands may be leased in the same manner as section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty to the Territory of Dakota, for an asylum for the insane, shall, upon the admission of said State of South Dakota into the Union, become the property of said State.

SEC. 15. That so much of the lands belonging to the United States as have been acquired and set apart for the pur-

pose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby, granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota, for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said Act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the State of Montana.

SEC. 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

SEC. 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September, twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to wit:

To the State of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools,

eighty thousand acres; for public buildings at the capital, of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.

To the State of North Dakota a like quantity of land as is in this section granted to the State of South Dakota and to be for like purposes, and in like proportion as far as practicable.

To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital at the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for state normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

SEC. 18. That all mineral lands shall be exempted from the grants made by this act. But if section sixteen and thirty-six, or any subdivision or portion of any smaller subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands

in said States, in lieu thereof, for the use and the benefit of the common schools of said States.

SEC. 19. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.